

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the matter of	)	
	)	
Applications Filed for the Transfer of Control of	)	WC Docket No. 08-238
Embarq Corporation to CenturyTel, Inc.	)	
	)	

**ORDER ON RECONSIDERATION**

**Adopted: February 21, 2012**

**Released: February 21, 2012**

By the Chief, Wireline Competition Bureau

**I. INTRODUCTION**

1. In this *Order on Reconsideration*, we address a Joint Petition for Reconsideration or Clarification (Joint Petition) filed by the New Jersey Division of Rate Counsel (Rate Counsel) and the National Association of State Utility Consumer Advocates (NASUCA) (together, State Advocates) on July 27, 2009.<sup>1</sup> In the Joint Petition, State Advocates request that the Commission modify or clarify the merger conditions adopted in the *Embarq/CenturyTel Order*<sup>2</sup> approving the merger of Embarq Corporation (Embarq) and CenturyTel, Inc. (CenturyTel) (together, Applicants or CenturyLink). For the reasons stated below, we dismiss the Joint Petition on procedural grounds and, in the alternative, deny the Joint Petition on the merits.

**II. DISCUSSION**

2. In the *Embarq/CenturyTel Order*, the Commission granted the application for the merger of Embarq and CenturyLink, subject to specific conditions. The Commission found that these conditions were necessary to protect the public interest.<sup>3</sup> Therefore, the Commission conditionally granted the application, subject to the Applicants' compliance with various voluntary commitments offered by the Applicants.<sup>4</sup> These conditions included, *inter alia*, a general commitment by CenturyTel and Embarq to maintain service levels for the Embarq operating companies that are comparable to those that Embarq

<sup>1</sup> Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc., Joint Petition for Reconsideration or Clarification by New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates, WC Docket No. 08-238 (filed July 27, 2009) (Joint Petition).

<sup>2</sup> See *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, WC Docket 08-238, Memorandum Opinion and Order, 24 FCC Rcd 8741, App. C (2009) (*Embarq/CenturyTel Order*). The combined entity, CenturyLink, along with Qwest Communications International Inc. (Qwest), filed an application, and ultimately gained Commission approval, for the transfer of control of Qwest to CenturyLink. See also *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc D/B/A CenturyLink for Consent to Transfer Control*, WC Docket 10-110, Memorandum Opinion and Order, 26 FCC Rcd 4194 (2011).

<sup>3</sup> See *id.* at 8755, para. 33.

<sup>4</sup> See *id.* at App. C.

wholesale customers experienced pre-merger.<sup>5</sup> Further, for a two-year period following the Transaction Closing Date, Embarq was required to continue to produce and make available competitive local exchange carrier (LEC) service performance reporting via its wholesale website, consistent with state commission requirements, except during system integration. Embarq must provide these reports to any requesting competitive LEC, and to the Commission upon request.<sup>6</sup> The State Advocates request that the Commission modify this condition to require that all “reports regarding the state specific service performance levels” also be provided to the respective public service commissions and the State Advocates.<sup>7</sup> The State Advocates argue that they, and the state commissions, should receive the reports to ensure that “all commitments are met and customers receive the protections contemplated by the merger approval.”<sup>8</sup>

3. The merged company also committed to offer retail broadband Internet access service to 100 percent of its broadband-eligible access lines within three years after the Transaction Closing Date.<sup>9</sup> State Advocates argue that the Commission should modify its conditions to require the merged entity to provide quarterly updates to public service commissions and the State Advocates regarding implementation of the broadband commitments.<sup>10</sup> State Advocates maintain that adding a quarterly reporting requirement for broadband availability is important so that State commissions and State Advocates can determine the progress toward the 100 percent commitment.<sup>11</sup>

4. As a threshold matter, CenturyLink contends that the Joint Petition should be denied because it fails to satisfy the standard for filing a petition for reconsideration: it does not claim that the Commission made any material error, nor does it raise any new facts.<sup>12</sup> State Advocates respond that the Joint Petition is procedurally proper because they did not have an opportunity to offer or propose modifications to the conditions in Appendix C that were presented *ex parte* on June 19<sup>th</sup>,<sup>13</sup> and subsequently clarified in an *ex*

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<sup>5</sup> *See id.*

<sup>6</sup> *See id.* Applicants closed the transaction on July 1, 2009. CenturyLink, <http://news.centurylink.com/index.php?s=43&item=2289> (last visited June 27, 2011). Accordingly, the conditions with a two-year term expired on July 1, 2011.

<sup>7</sup> Joint Petition at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Embarq/CenturyTel Order*, 24 FCC Rcd 8741, App. C. The conditions with a three-year term will expire July 1, 2012. *See supra* note 6.

<sup>10</sup> Joint Petition at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *See* CenturyLink Opposition to Petition for Reconsideration at 4 n.11 (citing *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964) (*WWIZ*), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)); *In re Petition for Reconsideration by National Ass'n of Broadcasters of Memorandum Opinion and Order Regarding Section 312(a)(7) of the Communications Act*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415, para. 4 (2003) (*National Ass'n of Broadcasters*). *See also Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications, Corp. (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corp. (subsidiaries), Assignees and Transferees; Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee*, MB Docket No. 05-192, Order on Reconsideration, 23 FCC Rcd 14241, 14242, para. 2 (2008).

<sup>13</sup> *See generally* Letter from Gregory J. Vogt, Counsel for CenturyTel, Inc., and Samuel L. Feder, Counsel for Embarq Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-238 (filed June 19, 2009) (Applicants June 19 *Ex Parte* Letter).

*parte* letter on June 22, 2009,<sup>14</sup> prior to release of the order on June 25, 2009.<sup>15</sup> Petitioners assert that, once the Commission decided to impose conditions to support the approval of the transaction, the Commission should have allowed for notice and comment.<sup>16</sup>

5. We find that the Joint Petition does not conform to the Commission's requirements for petitions for reconsideration, and therefore dismiss the Joint Petition under the delegated authority pursuant to Section 1.106(p)(2) of the Rules.<sup>17</sup> Petitions for reconsideration that rely on facts or arguments not previously presented to the Commission or to the designated authority may be granted only where: (1) the petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; (2) the petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity; or (3) the Commission or the designated authority determines that the public interest requires consideration of the new arguments.<sup>18</sup> State Advocates did not allege in the Joint Petition that any of these circumstances exist in this proceeding.

6. Moreover, we reject the State Advocates' assertion in their reply that they did not have an opportunity to respond to the imposition of closing conditions during the proceeding.<sup>19</sup> The initial list of voluntary conditions was filed on April 10, 2009,<sup>20</sup> and a more detailed list of voluntary conditions, which included both the Embarq service territory performance measurements commitment and the broadband deployment commitment, was filed on June 19, 2009.<sup>21</sup> Although there was not a designated comment cycle for the exact list of conditions eventually adopted by the Commission,<sup>22</sup> there was ample notice provided throughout the proceeding that such conditions were under consideration.<sup>23</sup> Indeed, other parties filed *ex parte* responses to the commitments that were filed on June 19,<sup>24</sup> and in their own filings, State Advocates supported conditions requiring Embarq to satisfy wholesale service standards and provide wholesale service performance reports to competitive LECs.<sup>25</sup> Further, Rate Counsel recommended that

<sup>14</sup> See generally Letter from Gregory J. Vogt, Counsel for CenturyTel, Inc., and Samuel L. Feder, Counsel for Embarq Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-238 (filed June 22, 2009).

<sup>15</sup> State Advocates Reply at 2.

<sup>16</sup> State Advocates Reply at 3 n.5 (citing *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 494 F.3d 188, 199–200 (D.C. Cir. 2007); *Solite Corp. v. U.S. E.P.A.*, 952 F.2d 473, 485 (D.C. Cir. 1991) (citing *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530–31 (D.C. Cir. 1982), *cert. denied*, 549 U.S. 835 (1982))).

<sup>17</sup> 47 C.F.R. § 1.106(p)(2).

<sup>18</sup> See 47 C.F.R. § 1.106(c).

<sup>19</sup> State Advocates Reply at 3 n.5.

<sup>20</sup> See Letter from Gregory J. Vogt, Counsel for CenturyTel, Inc., and Samuel L. Feder, Counsel for Embarq Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket 08-238 (filed Apr. 10, 2009).

<sup>21</sup> See Applicants June 19 *Ex Parte* Letter. Applicants filed a final version of the voluntary commitments on June 22, 2009. See Letter from Gregory J. Vogt, Counsel for CenturyTel, Inc., and Samuel L. Feder, Counsel for Embarq Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket 08-238 (filed June 22, 2009).

<sup>22</sup> See State Advocates Reply at 2.

<sup>23</sup> See, e.g., NuVox/Socket Comments at 32-33, 35-26. See *Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 900 (D.C. Cir. 2006) (stating that “further notice and comment are not required when additional fact gathering merely supplements information in the rulemaking record . . . without changing methodology”).

<sup>24</sup> See, e.g., Letter from John J. Heitmann, counsel to NuVox and Socket to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-238 (filed June 23, 2009).

<sup>25</sup> Rate Counsel Comments at 35-36; Rate Counsel Reply at 5 (supporting NuVox/Socket Joint Comments at 32-33).

the Commission adopt a 100 percent broadband deployment merger condition and requested that the Commission require that Applicants file detailed maps of broadband availability to both federal and state regulators.<sup>26</sup> We find that, in regard to both the wholesale service performance measurement and broadband deployment commitments, State Advocates had notice of the evidence in the record and commented on those issues before the Commission. We conclude that: (1) there is no change in circumstances, facts or arguments that were unknown to the State Advocates upon which they base their requests; (2) as discussed *infra*, the public interest is amply protected by the conditions adopted in the *Embarq/CenturyTel Order*; and (3) the Joint Petition therefore fails to satisfy the Commission's standard for filing a petition for reconsideration. Accordingly, we hereby dismiss the Joint Petition under delegated authority pursuant to Section 1.106(p)(2) of the Rules.<sup>27</sup>

7. CenturyLink asserts that, even if the Joint Petition had been properly filed, the proposed changes are unnecessary and not in the public interest. CenturyLink maintains that, under the conditions adopted by the Commission, competitive LECs will be capable of monitoring the wholesale performance they receive to ensure that the merger does not cause deterioration in their service.<sup>28</sup> In regard to requiring quarterly reporting for broadband deployment, CenturyLink argues that the Commission is "already under a statutory obligation to develop a comprehensive system for providing broadband data to state commissions under the Broadband Data Improvement Act, and the Commission is conducting a proceeding to determine how to implement the statute."<sup>29</sup> Thus, CenturyLink states, there is no justification for creating a specific obligation for the merged entity. Finally, CenturyLink argues that if voluntary commitments adopted within an order can be changed through reconsideration, perhaps long after merger closing, parties will be less willing to negotiate voluntary commitments in future transactions.<sup>30</sup>

8. We conclude that, even if the Joint Petition had been found to meet the standards for filing a petition for reconsideration, the relief that State Advocates request is not necessary to protect the public interest, and the Joint Petition is subject to denial pursuant to section 1.106(p)(1) of the Commission's rules.<sup>31</sup> Section 1.106(p)(1) states that the Bureau may deny, on delegated authority, petitions for reconsideration that fail to identify any material error or omission, or reason warranting reconsideration.<sup>32</sup>

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<sup>26</sup> Rate Counsel Comments at 22.

<sup>27</sup> 47 C.F.R. § 1.106(p)(2). *See Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1606-08 (2011). *See also Qwest Communications Company, LLC, Complainant, v. Northern Valley Communications, LLC, Defendant*, File No. EB-11-MD-001, Order on Reconsideration, FCC 11-148 (rel. Oct. 5, 2011) (dismissing a petition for reconsideration because it was procedurally defective and, in the alternative, denying it on the merits); *Applications of Fireside Media*, File No. BNP-20040130AQL, Order on Reconsideration, DA 11-1654 (MB Oct. 3, 2011) (dismissing a petition for reconsideration under delegated authority granted by section 1.106(p) for failure to identify any material error, omission, or reason warranting reconsideration).

<sup>28</sup> CenturyLink Opposition to Petition for Reconsideration at 5.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 47 C.F.R. § 1.106(p)(1).

<sup>32</sup> *Id.*; *see also WWIZ*, 37 FCC at 686; *National Ass'n of Broadcasters*, 18 FCC Rcd at 24415, para. 4; *Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications, Corp. (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corp. (subsidiaries), Assignees and Transferees; Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee*, 23 FCC Rcd at 14242, para. 2; 47 C.F.R. § 1.106 (c). *See also* 47 U.S.C. § 405(a).

State Advocates assert only that their proposed remedy would make the conditions “better.”<sup>33</sup> They did not claim, in the Joint Petition, that the Commission made any error, let alone any material error, omission, or reason warranting reconsideration, in the Order.<sup>34</sup> State Advocates seek instead to modify and supplement the reporting requirements post-merger and could have proposed those modifications during the pendency of the proceeding.<sup>35</sup> The *Embarq/CenturyTel Order* weighed the potential harms the State Advocates raise in the Joint Petition and imposed conditions, including appropriate reporting requirements, to address the potential harms.<sup>36</sup> We find that the opportunity for the Commission to request competitive LEC wholesale service data and the ability of competitive LECs to determine whether they are being discriminated against in the wholesale market provides sufficient safeguards against service discrimination in this instance. We also find that existing state requirements to make wholesale service data reports available to competitive LECs demonstrates the opportunity and ability of competitive LECs to monitor their own service and raise questions in regulatory fora where appropriate. Regarding the State Advocates’ request that the Commission require quarterly reporting for broadband deployment, there is no evidence in the record indicating that additional reporting requirements are necessary for CenturyLink’s broadband deployment beyond what the Commission is already considering in other proceedings.<sup>37</sup> Moreover, nothing in the *Embarq/CenturyTel Order* precludes state authorities from requiring CenturyLink to provide them access to either the wholesale service report or data regarding broadband deployment. For these reasons, we hereby conclude that the Joint Petition is subject to dismissal pursuant to section 1.106(p)(1) of the rules.<sup>38</sup>

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<sup>33</sup> Joint Petition at 3.

<sup>34</sup> The State Advocates argue in their reply that they did not have an opportunity to respond to the conditions during the proceeding and thus claim that reconsideration is appropriate. State Advocates Reply at 3 n.5. As discussed above, we find that the public had ample notice and opportunity to respond during the comment cycle and to file *ex parte* responses to the Applicants’ proposed conditions. *See supra* para. 5.

<sup>35</sup> Joint Petition at 3.

<sup>36</sup> *Embarq/CenturyTel Order*, 24 FCC Rcd 8741, App. C.

<sup>37</sup> *See, e.g., Comment Sought on Providing Eligible Entities Access to Aggregate Form 477 Data as Required by the Broadband Data Improvement Act*, WC Docket No. 07-38; GN Docket Nos. 09-47, 09-51, Public Notice, DA 09-1550 (2009); *Dates Established For Comment on Providing Eligible Entities Access to Aggregate Form 477 Data as Required by the Broadband Data Improvement Act*, WC Docket No. 07-38, GN Docket Nos. 09-47, 09-51, Public Notice, DA 09-1598 (2009); *Providing Eligible Entities Access to Aggregate Form 477 Data; Implementation of the Broadband Data Improvement Act of 2008; A National Broadband Plan for our Future*, WC Docket No. 07-38; GN Docket Nos. 09-47, 09-51, Order, FCC 10-71 (2010); Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (2008) (codified at 47 U.S.C. §§ 1301-04). *See also Modernizing the FCC Form 477 Data Program; Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership; Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering; Review of Wireline Competition Bureau Data Practices*, WC Docket Nos. 11-10, 07-38, 08-190, 10-132, Notice of Proposed Rulemaking, 26 FCC Rcd 1508 (2011).

<sup>38</sup> *See supra* note 26.

### III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration or Clarification filed July 27, 2009, by the New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates **IS DISMISSED**, and considered in the alternative, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett  
Chief, Wireline Competition Bureau